82-447

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ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

SENTRY INSURANCE A MUTUAL COMPANY AND GONZALES MANUFACTURING AND INDUSTRIAL MACHINE WORKS, INC.

Petitioners

VERSUS

TODD SHIPYARDS CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the maritime doctrines of *Ryan* indemnity and warranty of workmanlike performance (WWLP), originated for the protection of the vessel owner, be extended to provide to a shipyard who contracted for the vessel repairs, itself found to be negligent as a cause of the damage, indemnity against negligent subcontractors who participated in the repairs?

2. Should a welding/machine shop which fabricated welded blades exactly according to the specifications and limitations fixed by a turbine expert; which was not permitted to make stronger, penetration welds; and which had no facilities for testing the blades; be held responsible for the defective design which caused the blades to fail?

3. Should the Court of Appeals usurp the discretion of the Trial Judge by reversing his award of post-judgment interest?

4. Was the award of attorneys' fees to the vessel owner in this case, not involving indemnity of the shipowner under a seaworthiness doctrine, a violation of the uniform, "American Rule" against award of attorneys' fees in maritime damage cases?

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. Auto Transportation, S.A.

2. Todd Shipyards Corporation

3. Travelers Insurance Company

4. Sentry Insurance, A Mutual Company

5. Turbine Services, Inc.

6. Gonzales Manufacturing and Industrial Machine Works, Inc.

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STATUTES AND CONSTITUTIONAL PROVISIONS

LSA-R.S. 9:2771 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

TODD SHIPYARDS CORPORATION

VERSUS

TURBINE SERVICES, INC.,
GONZALES MANUFACTURING AND INDUSTRIAL
MACHINE WORKS, INC., and a Certain
Turbine Rotor, Casing, Blades, Rings,
Housing and All Assorted Parts Thereto,
all of which Being From the S/S KATRIN

- and -

TURBINE SERVICES, INC.

VERSUS

THE VESSEL S/S KATRIN

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Defendants Sentry Insurance, A Mutual Company and Gonzales Manufacturing and Industrial Machine

Works, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 674 F.2d 401, is reprinted in the Appendix hereto.

The denial of rehearing by the Court of Appeals for the Fifth Circuit is reprinted in the Appendix hereto.

The opinion of the District Court for the Eastern District of Louisiana, reported at 467 F.Supp. 1257 is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 29, 1982. A timely Petition for Rehearing and Rehearing En Banc was denied on June 14, 1982, and this petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TEXT OF AUTHORITIES INVOLVED

Louisiana Revised Statutes, LSA-R.S. 9:2771:

"No contractor shall be liable for destruction of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration or defect occurs or becomes evident prior to or after delivery of the work to the owner or prior to or after acceptance of the work by the owner. The provisions of this Section shall not be subject to waiver by the contractor. Acts 1958, No. 183 § 1, as amended Acts 1960, No. 84, § 1.

All other authorities are case citations contained in the text of the Petition for Writs.

STATEMENT OF THE CASE

Auto Transportation S.A. (Auto) filed this action for damages to its Greek vessel, the KATRIN, due to alleged negligent repairs performed by Todd Shipyards Corporation (Todd); its subcontractor, Turbine Services, Inc.; and Gonzales Manufacturing and Industrial Machine Works, Inc. (Gonzales).

The KATRIN limped into New Orleans needing extensive turbine repairs, but Auto elected only to do partial repairs despite recommendations by its own surveyor for complete reblading.

Todd contracted directly with Auto to do turbine re-

pairs to the KATRIN, and subcontracted a large part of the turbine work to Turbine Services. Turbine Services, in turn, had Gonzales do specified welding and machining work on the low pressure turbine, including the welding-fabrication of some replacement blades. The disassembly, reassembly and testing of the turbine was done by Turbine Services and Todd.

During river trials in New Orleans after the repairs, the KATRIN's low pressure turbine sustained some damage which the District Court found to be caused by welded blades parting. Surveys to determine the extent of river trial damage revealed a warped casing not caused by the repairs, but requiring extensive turbine overhaul.

The turbine was repaired by its manufacturer, Siemens, in Germany. After reinstallation of the low pressure turbine in the KATRIN, the vessel once again sustained serious turbine damage off Cork, Ireland, due to Owner's failure to repair excessive clearances in the high pressure turbine, and not due to the New Orleans repairs.

Following the Cork casualty, Auto sold the vessel for scrap for $346,£00. Auto's suit against all parties claimed $3,507,562 for the German repairs and the much later Cork casualty.

The District Court denied Auto's claim for loss of the vessel off Cork, finding no negligence of repariers and knowledge by owner of the turbine conditions. On the river

trial casualty, the District Court held that Todd, Turbine Services and Gonzales were all negligent; all breached obligations of workmanlike performance; and were liable to Auto for $967,633.20 in damages for part of the repair and reinstallation costs, down time of the vessel, and miscellaneous expenses. The District Court also denied all insurance exclusions of Sentry, Gonzales' insurer, and Travelers, Turbine Services' insurer, and granted Todd full indemnity over against both Turbine Services and Gonzales. Interest was declared to be post-judgment only, and Auto was awarded attorneys fees.

On appeal, the Fifth Circuit made several changes by: (1) applying clear Louisiana law to uphold the insurance exclusions of Sentry and Travelers as to cost of repair or replacement of the insured's work or work product; and (2) reducing loss of down time to 166 days, or $498,000 as opposed to $645,000; but refused to reverse the indemnity award to Todd or the award of attorneys fees to Auto; and usurped the discretion of the District Court by overturning its award of post-judgment interest. In conflict with Louisiana law and other Federal Circuits and the facts of the case, the Court of Appeals also continued to cast Gonzales as a design engineer/manufacturer in its duty to the vessel.

REASONS RELIED ON FOR GRANTING THE WRIT

QUESTION 1 - TODD INDEMNITY

The Fifth Circuit Court of Appeal, perpetuating the

error committed by the District Court, has improperly extended the maritime doctrines of *Ryan* indemnity (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956)) and warranty of workmanlike performance (WWLP) in this case by granting full indemnity to Todd Shipyards against Turbine Services and Gonzales. Since Turbine Services was in direct contractual relationship with Todd, only the indemnity as against Gonzales will be discussed.

This decision is contrary to the overwhelming jurisprudence of the Fifth Circuit itself, of other Federal Circuits and of the United States Supreme Court. It also opens the door to chaotic results in future marine repair cases.

A. *RYAN DOCTRINE - INAPPLICABLE*

The District Court grounded its indemnity to Todd on an implied contractual warranty or obligation of workmanlike performance stemming from *Ryan, supra*, which the Court said was owed by Gonzales to Todd. Despite the absence of any contract between Todd and Gonzales, the Court relied on *Whisenant v. Brewster-Bartle Offshore Company*, 445 F.2d 349 (5th Cir., 1971) to extend the "zone of responsibility" to Todd. *Todd Shipyards Corp. v. Turbine Service, Inc.*, 467 F.Supp. 1257 (D.C. La., 1978) at p. 1300-1302.

The Fifth Circuit, likewise relying upon *Whisenant*,

supra, affirmed, holding that implied warranties of workmanlike performance may extend to parties who are not in direct contractual relationship. *Todd Shipyards Corp. v. Turbine Services, Inc.*, 674 F.2d 401 (5th Cir., 1982) at p. 416, 417.

Both of these holdings are clear error.

The *Ryan* indemnity relied upon by the District Court is not even applicable to the facts of the case at bar. It is the shipowner's strict liability for unseaworthiness that rests at the heart of the *Ryan* indemnity doctrine, which holds that where a shipowner contracts with another contractor to perform services for the vessel, whereby improper performance of the services may render the vessel unseaworthy, the implied warranty that the contractor will perform in a workmanlike manner serves to indemnify the strictly liable shipowner against claims resulting from the contractor's negligence or breach of performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956); *Fairmont Shipping Corp. v. Chevron Int. Oil Co., Inc.*, 511 F.2d 1252 (5th Cir., 1975); *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435, (5th Cir., 1971), *cert. den.*, 404 U.S. 942, 92 S.Ct. 288.

The key elements of *Ryan* are absent from the case at bar. There is no claim for unseaworthiness; no absolute liability of the shipowner; and it is the shipowner who is suing multiple marine contractors for damage from negligent repairs. See *Fairmont Shipping Corp. v. Chevron, supra.*

B. *WWLP - NOT OWED TO TODD*

While the Federal Courts have extended the *Ryan*-bred warranty of workmanlike performance past its stevedore origin to encompass the duty owed by marine contractors, ship repairers, diesel repairers, etc. to perform in a competent fashion, there is no doubt that in *all* such cases the warranty (WWLP) flows in favor of the vessel or vessel owner for whose benefit the services were being performed. *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296 (5th Cir., 1973); *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir., 1971); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 81 S.Ct. 200 (1960).

Appellant here does not disagree that the WWLP may extend to the *shipowner* or the *vessel* from a subcontractor-repairer who performs work on or for the vessel, even if no actual contract exists with the shipowner; and that the vessel and vessel owner are third-party beneficiaries of such services and thus fall under the WWLP. *Whisenant v. Brewster-Bartle Offshore Company, supra; U.S. v. San Francisco Elevator Co.*, 512 F.2d 23 (9th Cir., 1975); *Crumady v. The Joachim Hendrick Fisser*, 358 U.S. 423, 79 S.Ct. 445 (1959).

But Todd Shipyards is *not* a vessel owner in the case at bar. It is, rather, the entity which had the primary duty to the vessel KATRIN to perform the turbine repairs. The District Court found Todd had an affirmative duty to make

tests and inspections during and after the repairs to assure the intended use of the product; to know the course of repair to be used by its subcontractor; and to inspect the finished repairs closely enough to determine if substandard work or design changes occurred. *Todd Shipyards, supra,* 467 F.Supp. at 1286, 1287. The Court found Todd negligent in failing to perform all of those duties; failing to supervise or inspect the repairs; hiring an incompetent subcontractor (Turbine Services) to do the repairs, and "ignoring" the repair; all of which were held to be a legal cause in fact of the damage, without which it would not have occurred. *Todd Shipyards, supra,* 457 F.Supp. at 1287, 1288, 1296, 1298, 1299. The Fifth Circuit affirmed the ruling that Todd was negligent, and that such negligence was the proximate cause of the damage. *Todd Shipyards, supra,* 647 F.2d at 410.

None of the cases relied upon by the District Court or the Fifth Circuit to grant Todd indemnity extended the "zone" of WWLP indemnity to encompass a jointly negligent shipyard/contractor. In *Whisenant v. Brewster-Bartle Offshore Co., supra,* there was no contract between the vessel owner and the marine contractor, and the Court, following *Crumady v. Joachim Hendrick Fisser,* 358 U.S. 423, 79 S.Ct. 445, merely held that since the services were for the *benefit of the vessel,* the WWLP flowed *in favor of the vessel owner* and gave him indemnity. *Whisenant, supra,* 446 F.2d at 400-401. In *Parfait v. Jahncke Service, Inc., supra,* the essence of the holding was that:

> "Under the *Ryan* doctrine stevedores and other shore-based contractors who go aboard a vessel by the owner's arrangement or by his consent to perform service *for the ship's benefit impliedly warrant to the shipowner* that they will accomplish their task in a workmanlike manner." *Parfait, supra,* 484 F.2d at 301 [emphasis supplied].

So that, while the *Ryan* type WWLP indemnity has indeed been extended, the extension has been narrowly construed by the Courts to afford indemnity to the *vessel owner* for whose benefit the services are performed, whether the services are stevedoring, repair, or otherwise, and whether the shipowner is or is not in direct contractual relationship to the contractor. *United New York Sandy Hook Pilots Assn. v. Rodermond Indus.,* 394 F.2d 65 (3rd Cir., 1968); *Lusich v. Bloomfield S.S. Co.,* 355 F.2d 770 (5th Cir., 1966); *Booth S.S. Co. v. Meier & Oelhaf Co.,* 262 F.2d 310 (2nd Cir., 1958); *Whisenant v. Brewster-Bartle Offshore Co., supra; Brock v. Coral Drilling, Inc.,* 477 F.2d 211 (5th Cir., 1973); *U.S. v. San Francisco Elevator Co.,* 512 F.2d 23 (9th Cir., 1975).

C. *NO INDEMNITY AMONG JOINTLY NEGLIGENT CONTRACTORS*

Far from extending the *Ryan*-WWLP doctrine to allow a jointly-negligent contractor to assume the vessel owner's position of indemnity for poor performance, the Courts have specifically denied such extensions.

In *Loffland Brothers v. Roberts,* 386 F.2d 540 (5th Cir. 1967), *cert. den.* 88 S.Ct. 778, drilling and casing contractors sought indemnity in a platform injury case on the theory of implied warranty of workmanlike performance. The Court denied extension of the *Ryan* doctrine to a non-shipowner situation, and held that one negligent contractor was not a third-party beneficiary to any indemnity contract between the well owner and another contractor.

In a later case, *Nelson v. Jacksonville Shipyards, Inc.*, 440 F.2d 668 (5th Cir., 1971), the Fifth Circuit in dicta stated:

> "...we have serious doubts whether under the *Ryan* doctrine an actively negligent independent contractor can ever recover indemnity from another independent contractor. Cf. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 2952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318; *Grigsby v. Coastal Marine Serv. of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011, 1039; *General Dynamics Corp. v. Adams*, 5 Cir., 1965, 340 F.2d 271."

Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (5th Cir., 1969), *cert. den.* 396 U.S. 1033, cited by the Court in *Nelson, supra,* granted *Ryan* indemnity in favor of the shipowner, Aiple, against a negligent marine service corporation and an equipment supplier but held that under maritime law there was no relationship between these two negligent contractors to the vessel to give rise to a warranty of workmanlike performance. Therefore, indem-

nity between them was denied. Judge Brown called this a "throw out the lifeline" or "juridical general average" approach not justified by maritime law. *Grigsby v. Coastal Marine, supra*, 412 F.2d at 1039. The *Grigsby* Court also rejected indemnity under any active-passive tort theory since both contractors were found negligent as a cause of the incident. *Grigsby, supra*, at p. 1040.

The Fifth Circuit has consistently refused to allow indemnity in favor of one negligent contractor against another negligent contractor in a maritime contract situation. In *Humble Oil Co. v. Naquin*, 414 F.2d 912 (5th Cir., 1969) where several contractors contracted to perform services for the benefit of the well and its vessel, the Court found that the contracted services were for the benefit of the owner, and that no contractual agreement or indemnity through WWLP could be implied or construed among the contractors.

In *Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir., 1975), involving a vessel and platform injury, the Court denied claims of indemnity of one contractor against another under both *Ryan*-WWLP theory and active-passive tort theory since a finding of negligence of both contractors as a cause of the incident was supported by the evidence. The Fifth Circuit held that it had "...repeatedly resisted all efforts to project this [WWLP under *Ryan*] implied indemnity concept outside the special circumstances of the shipowner relationships that evoked the doctrine in the first place..." *Law v. Sea Drilling, supra*, 510 F.2d at 246, 252.

Relative to Todd's indemnity in the case at bar, the negligence which denied Conoco the right to WWLP indemnity in *Law v. Sea Drilling, supra*, was its failure to exercise its *supervisory responsibilities* over the equipment transfer, since under its contract it (like Todd) bore full responsibility for the entire rigging operation, which it had delegated in part to Seadrill. *Law v. Sea Drilling, supra*, 510 F.2d at 246, 247.

Gonzales, in the case at bar, did specified welding and machine work on the low pressure turbine of the KATRIN. All work was at the direction of Turbine Services, and there was no written or oral contract with Todd. Rather, Todd denied any knowledge of the machining and welding of blades by Gonzales. See Findings of Fact 47-51, 62-66, 104, *Todd Shipyards Corp., supra*, 467 F.Supp. at 1273-1275, 1277.

While a duty of WWLP may be owed from Gonzales to Auto, since the work on the low pressure turbine was for the ultimate benefit of the vessel, no work was done for Todd, no products sold to Todd and no contract existed with Todd.

As the Fifth Circuit recently held, following its consistent past history:

> "Although we have extended the doctrine [WWLP] to non-stevedore maritime contractors in limited circumstances, the reach of that doctrine has never encompassed a situation where no

> warranty, express or implied, has been given by the alleged indemnitor. *That is the situation here. It is implicit in the 'warranty of workmanlike performance' that the warrantor is performing some type of duty for the benefit of the party to whom the warranty is made.* There must, of course, be a warranty in order to have a breach thereof. Texas Eastern was engaged in no type of service for McDermott and made no warranty to its contractor."

Thibodaux v. Texas Eastern Transmission Corp., 548 F.2d 581 (5th Cir., 1977).

Likewise, the active-passive theory of indemnity among tort feasors, permitted by *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir., 1969) would not avail Todd in the case at bar under the rulings of *Tri-State Oil Tool, supra; In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir., 1974); and *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir., 1981), since Todd's negligence in failing to supervise, inspect or correct repairs or to select a competent subcontractor were held to be a cause in fact of the damages.

D. *CONTRIBUTION*

If the decision of the Fifth Circuit as to the liability of Gonzales and its standard of care (see Argument on Question 2, *infra*) are upheld by this Court, the finding that Todd, Turbine Services and Gonzales all breached their duty to the shipowner and were all negligent as a legal and proximate cause in fact of the damage paves the way to a

division of damages on comparative negligence principles, which would be appropriate under the facts of this case. See *U.S. v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708 (1975); *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F.2d 31 (5th Cir., 1975), *cert. den.* 96 S.Ct. 785.

This principle of comparative fault, in light of the negligence of Todd found by the Courts below and its superior (but abdicated) overall responsibility for the entire turbine repair, would be inherently more fair than imposing full liability on the subcontractor who did only part of the repairs and allowing equally negligent Todd to go "scot-free". *Griffith v. Wheeling-Pittsburgh Steel Corporation*, 610 F.2d 116 (5th Cir., 1979).

E. *PRODUCTS THEORY*

The District Court in granting Todd indemnity against Gonzales, also mentioned a theory of indemnity based upon Gonzales putting a defective product in the "stream of commerce." *Todd Shipyards Corp., supra*, 467 F.Supp. at p. 1303.

Firstly, the user or consumer of the alleged "defective product" was not Todd but the vessel owner, which already has a right of recovery under maritime WWLP.

Secondly, Todd's liability in this case was not strict liability as a vendor so as to give it indemnity rights

against Gonzales. Gonzales did not sell to or contract with Todd. And Todd's negligence, as set forth hereinabove, was held independent and a proximate cause of the damages.

Thirdly, since this is a maritime contract case, there is a question as to whether products liability theory is applicable, given the jointly negligent relationship held to exist among the three contractors, Todd, Turbine Services and Gonzales. See *Williams v. Brasea, Inc.*, 497 F.2d 67 (5th Cir., 1974).

And lastly, since Gonzales neither originated nor controlled the method of blade production, a strong question exists as to whether Gonzales could be cast, even under landlaw, as a "manufacturer".

QUESTION 2 - GONZALES AS ENGINEER/DESIGNER

The Fifth Circuit affirmed the District Court's holding that Gonzales had a duty to do more than follow the specific limitations and directions of Turbine Services on how to weld-fabricate the turbine blades. The two Courts held that Gonzales, a machine shop, had a duty to satisfy itself that a *plan* to use welded turbine blades was reasonable: to complete the welds so as to reasonably *insure* the blades would hold up in service; to ascertain the metallic content of the parts; to choose the proper rod; to use full penetration welds instead of fillet and fusion welds; to pre-heat, post-heat and stress relieve the materials; and

perform or commission tests to *insure* the welds would hold under normal operating conditions. *Todd Shipyards Corp., supra*, 674 F.2d at 409 and 467 F.Supp. at 1289-1291.

These requirements of Gonzales under the facts determined to exist by the District Court and the predominant Federal case law, are patently absurb.

A. *FACTS*

The ruling of the Fifth Circuit as to the duty or standard of Gonzales rests upon, and therefore perpetuates, the clear error of the District Court in failing to acknowledge *uncontested facts* as to the origin and limitations on Gonzales' work on the welded blades.

The Findings of Fact of the District Court, relied upon by the Fifth Circuit, did conclude that the blade welding was an experimental process; Turbine Services directed Gonzales exactly where to cut the blades and weld them; Sheridan did not know the metal content of the blades so a welding rod for dissimilar metals was tried; Sheridan took the sample blades for testing, told Gonzales the welds were O.K., and directed Gonzales to do all the welds the same way. *Todd Shipyards Corp., supra*, 467 F.Supp. at 1273-1275, F.F. 47-51, 62, 66.

Not included in either opinion, but *totally uncontested in the evidence*, are the following facts: (all references are to trial transcripts).

Turbine Services brought blades and roots and asked Gonzales to perform an *experiment* to see if the blades could be welded together. The specification offered by Turbine Services was that *no* welding could occur on the airfoil; *no* machine cuts or bevels could be made for penetration welds (TR Sheridan, 3/27/78, p. 145-147; TR Hoover, 5/18/78, p. 13-30; TR Saint, 5/22/78, p. 57-60); and *no* excess weld material could be allowed to extend out past the flush surface of the root or airfoil because it would prevent refitting in the groove and hamper steam flow. (TR Saint, p. 61-64).

After Sheridan returned the "tested" blades and told Gonzales to do the rest the same way, Saint complied with these specifications and established a welding procedure, using a mechanical "jig" to physically hold the blade and root in correct position; using the same welding rod previously used and the same amperage setting on the welding machines; and utilizing the same type of welds used on the experimental blades. (TR Saint, p. 55-70).

Gonzales *suggested* that full penetration welds be used and bevel cuts be machined to accept more weld material but this was rejected by Sheridan, who said it would affect the fit of the root in the groove and the airfoil configuration. (TR Sheridan, 3/27/78, p. 145-147; TR Hoover, 5/18/78, P. 14-21; TR Saint, p. 55-65, 66-70).

Given these limitations and specifications, Saint testified—and *every expert agreed*—that there literally was

no other way to weld the blades to the roots. (TR Saint, p. 61-64; TR Kugler, 1/18-20/78, p. 313, 314, 332, 333; TR Harrison, 3/14/78, p. 20-28.

Sheridan was both the customer *and* the turbine expert. *He* knew the internal workings of turbines and the stresses to which blades were subjected, while Hoover and Saint did *not* have such knowledge. (TR Hoover, 5/18/78, p. 15-28, 49-50; TR Sheridan, 3/27/78, p. 150-151; 3/28/78, p. 62).

The Courts' holding that Gonzales was required to *initiate* its own specifications to test the metal, pre-heat, post-heat and stress relieve, test the welds and ascertain that the welded blades would function inside the turbine, flies in the face of both the evidence and Federal and State law.

Gonzales *had no capacity* to stress relieve or to test the welds, told this to Sheridan, and Sheridan informed Gonzales that Turbine Services would test the welded blades. (*Todd Shipyards, supra*, 467 F.Supp. at 1273-1275, F.F. 51, 65; TR Hoover, 5/18/78, p. 9, 22-30; TR Sheridan, 3/27/78, p. 145-149).

Auto Transport's expert, Frank Higgins, admitted that specifications for stress relief, pre-heat or post-heat are properly initiated by the *owner* or its *engineer, not* by the *contractor.* (TR Higgins, 3/6/78, p. 135-145; and Mr. Harrison, another plaintiff's expert, agreed that it was the

function of owner to give specific specifications to contractor for the work. (TR Harrison, 3/13/78, p. 160-163).

Even *Siemens*, the manufacturer to whom the turbine was sent for rebuilding, did not undertake to heat or stress relieve the turbine parts—or anticipate that it would be necessary—until *directed* to do so by owner's representative, Mr. Higgins; and then they charged *extra* for it. (TR Higgins, 3/6/78, p. 135-145; Plaintiff's Exhibit No. 56).

B. *LAW*

To be held to the *duty* of a manufacturer—i.e., to have a responsibility for proper design, production and testing—one must first have the *opportunity* to participate in the design, production methods and testing.

Where a fabricator or contractor fabricates a product strictly in accord with rigid specifications supplied by the customer, to the customer's design and plan; where the customer and not the contractor is knowledgeable about the particular uses to which the completed product will be put; where the contractor does not hold himself out as a designer of such product; and the customer assumes the obligation of testing the fabricated product and installing it; then there can be no liability of the fabricating contractor if the product fails to meet the intended use where the specifications, design or testing are insufficient for the use to which the product is put. *Garrison v. Rhom & Haas Company*, 492 F.2d 346 (6th Cir., 1974); *Garrison v. Jervis B.*

Webb Co., 583 F.2d 258 (6th Cir., 1978); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.*, 201 F.Supp. 191 (N.D. Ohio, 1961).

In *Garrison v. Rhom & Haas Company, supra*, defendant fabricated a dolly according to designs, plans and specifications furnished by the plant owner. Injuries caused by the dolly resulted in suit against the manufacturer on alleged defective design, failure to warn and failure adequately to test. The Court in the *Garrison v. Rhom & Haas* case held:

> "While it may be proper to impose upon a manufacturer making goods for the general public a duty to test for safety in reasonable end-uses, *we find it unreasonable to impose upon a manufacturer such a duty to test for design safety where the manufacturer is making something to particular specifications supplied by the customer. In such a situation the only thing that such a manufacturer should reasonably be expected to test for is whether the specifications have been complied with. In situations like this the customer who submits the specifications should have the basic responsibility for testing. The customer who submits the specifications knows the intended use and the specific manner in which that use is to be carried out. In this case, Orangeville did not even know the specific intended use so far as weight-loads and heights were concerned.*" *Garrison v. Rhom & Haas Company*, 492 F.2d 346 (6th Cir., 1974), at p. 353 [emphasis supplied].

Analagous to these facts, a building contractor given

specifications from an architect is not expected to investigate the architect's design as to whether it will work or not, or to load-test the beams or joists he erects following the specifications. He is entitled to rely on the specifications furnished to him as being sufficient and to erect the structure in strict accordance with these guidelines. Thus, a Louisiana statute, LSA-R.S. 9:2771 provides:

> "No contractor shall be liable for destruction of or defects in any work constructed, or under construction, by him if he constructed or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration or defect occurs or becomes evident prior to or after delivery of the work to the owner or prior to or after acceptance of the work by the owner. The provisions of this Section shall not be subject to waiver by the contractor. Acts 1958, No. 183 § 1, as amended Acts 1960, No. 84 § 1.

Following this statute, the Supreme Court of Louisiana in *LeBreton v. Brown*, 277 So.2d 645 (S.Ct., 1973), held that where an owner provided the contractor with specifications as to the pilings and foundation plan, but incorrectly calculated the load-bearing capacity of the pilings, the contractor, who didn't know what load was to be placed on the foundation, was not liable for subsequent failure when he put down the pilings per the plan.

Also, the Louisiana Fourth Circuit, reversing then State District Judge Fred J. Cassibry, held that it would be "...untenable to construe the cited statute [R.S. 9:2771] as imposing upon a contractor the burden of proving that plans and specifications, prepared by experts, were insufficient and defective, when all admit he has performed in strict accordance therewith." *Pittman Construction Co., Inc. v. City of New Orleans*, 178 So.2d 312 (La. App. 4 Cir., 1965), *W.R.* 179 So.2d 274, 248 La. 434 (S.Ct., 1965).

Gonzales fabricated the blades under the rigid specifications and prohibitions given it by Turbine Services. Admittedly a full penetration weld would have been stronger. But Gonzales wasn't permitted to use such a weld or allowed any input into design or production methods. Therefore, the insufficiency of the welded blades produced exactly to Turbine Services design cannot be assessed against Gonzales, which had *no freedom of choice* as to the methods of production, design or testing of the product. *Littlehale v. E. I. du Pont de Nemours & Co.*, 268 F.Supp. 791 (S.D.N.Y. 1966), *affirmed* 380 F.2d 274 (2nd Cir., 1967); *Maryland Casualty Co. v. Independent Metal Products, Inc.*, 203 F.2d 838 (8th Cir., 1953); *Garrison v. Rhom & Haas Company, supra; Garrison v. Jervis B. Webb Co., supra.*

QUESTION 3 - POST JUDGMENT INTEREST

Usurping the discretion of the Trial Judge who tried the case for six months, the Fifth Circuit reversed the

lower Court's award of post-judgment interest and directed that pre-judgment interest be paid.

While generally an award of pre-judgment interest is favored in admiralty cases, the decision whether such award should be made rests within the sound discretion of the Trial Judge. *Alkemeon v. Naviera, S.A. v. M/V Marina L.*, 633 F.2d 789 (9th Cir., 1980). The Judge's discretion should be exercised with a view towards granting pre-judgment interest unless exceptional circumstances exist. *Alkemeon Naviera, S.A. v. M/V Marina L, supra; Mecom v. Levingston Shipbuilding Co.*, 622 F.2d 1209 (5th Cir., 1980).

There are many reasons which the Courts have held to justify exercise of judicial discretion *not* to award pre-judgment, such as: if the amount claimed is unliquidated or uncertain; *Sinclair Refining Co. v. S.S. Green Island*, 426 F.2d 260 (5th Cir., 1970); the existence of a severely contested, genuine dispute regarding ultimate liability and extreme complexity of issues; *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir., 1970); *Chitty v. M/V Valley Voyager*, 408 F.2d 1354 (5th Cir., 1969); judgment awarded to the plaintiff of substantially less than claimed; *Kawasaki Zosensho v. Cosulich Societa Triestina Di Navigazions*, 11 F.2d 836 (5th Cir., 1926).

In the case at bar the issues were both hotly contested—in a six-month trial—and in genuine dispute. The plaintiff sued for $3,507,562 and was awarded $967,633.20—

a reduction due largely to owner's own fault in failing to remedy known high pressure turbine excessive clearances.

The issues of liability—at least as to Gonzales—are still in dispute and all parties defendant are contesting the indemnity awards.

Sufficient of the criteria outlined above existed in the case at bar for the Trial Judge to exercise his discretion and award post-judgment interest. *Mecom v. Levingston Shipbuilding Co., supra.*

At the very least, the Fifth Circuit should have remanded to allow the Trial Judge to state his reasons for entering post-judgment interest, particularly since the case was remanded for final damage calculations anyway. *Alkemeon Naviera S.A. v. M/V Marina L, supra.*

QUESTION 4 - ATTORNEYS FEES

The prevailing rule on attorneys' fees in admiralty cases, the "American Rule" holds that the prevailing party in a damage case is not entitled to collect attorneys' fees from the losing party. *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612 (1975).

The Fifth Circuit in the case at bar states that the *rule* in the Fifth Circuit is that:

> " '...foreseeable damages recoverable for breach of warranty of workmanlike performance include

> reasonable attorney's fees and litigation expenses. *Strachan Shipping Co. v. Koninklyke Nederlandsche*, 5th Cir., 1963, 324 F.2d 746.' *McCawley v. Ozeanosun Compania, Maritime, S.A.*, 505 F.2d 26, 32 (5th Cir., 1974); *Accord, Thibodeaux v. Texas Eastern Transmission Corp.*, 548 F.2d 581, 587 (5th Cir., 1977)." *Todd Shipyards Corporation v. Turbine Service, Inc.*, 674 F.2d 401 at p. 415.

However, this Fifth Circuit "rule" is only applied in cases where a contractor's breach of warranty of workmanlike performance grants *indemnity* to the vessel owner under *Ryan*. That is, whether the vessel owner is held strictly liable for unseaworthiness caused by the stevedore's or contractor's fault, the *Ryan* doctrine of WWLP grants the shipowner indemnity, to include cost of defense and attorneys' fees. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124, 76 S.Ct. 232 (1956); *McCawley v. Ozeanosun Compania Maritime S.A.*, 505 F.2d 26 (5th Cir., 1974).

The cases cited by the Fifth Circuit in support of granting attorneys' fees are all *Ryan indemnity* cases where the strictly liable shipowner is recovering the costs he has had to expend to defend or settle his vicarious, strict liability created by the fault (breach of WWLP) of another.

This is *not* a *Ryan* indemnity case. Auto Transportation was not cast in strict liability vicariously. It has sued as a plaintiff for *damages*, alleging fault, negligence and breach of contract. No *indemnity* is owed to Auto because

it has not been cast for any judgment.

As an ordinary damage suit in admiralty, the prevailing American Rule should apply, and attorneys' fees should be denied. *Alyeska Pipeline Co. v. Wilderness Society, supra.*

CONCLUSION

Granting of full indemnity to one jointly negligent contractor against another negligent contractor violates the intent and purpose of the indemnity theories of *Ryan* and WWLP. It is contrary to prior applications of these theories by the United States Supreme Court, the Fifth Circuit and other Federal Circuits. It is an unwarranted extension of the WWLP, particularly under the facts of this case, to a party for which no services were performed and thus no warranty owed. And perhaps most importantly, it frustrates the more-fair comparative negligence rule which should be applied among parties jointly at fault.

This Court should overturn the onerous burden placed upon Gonzales by the Courts below. In casting Gonzales as a "manufacturer" with duties of design, testing, production control and foresight into ultimate uses of the turbine blades, the Courts below committed clear error by ignoring uncontested facts and failing to apply State and Federal law which frees a fabricator from liability for design and production-method failure if he had no freedom of input into these criteria. Liability as to Gonzales should be reversed.

Under the tangled and complex issues of this case, with literally all phases of the litigation—liability, condition of the turbine, damages, causation and indemnity—being vigorously contested; and considering the award of less than one-third of the amount claimed, the Trial Judge's award of post-judgment interest should be reinstated.

Since this is a damage case, not an indemnity case, the American Rule against award of attorneys' fees should be held to apply.

For these reasons, Writs of Certiorari should be granted.

Respectfully submitted,

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